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No. 83-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PITTSBURG & MIDWAY COAL MINING CO.,
Appellant,

v.

REVENUE DIVISION, TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,
Appellee.

On Appeal from the Court of Appeals of New Mexico

JURISDICTIONAL STATEMENT

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July 1983

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QUESTION PRESENTED

Whether an unapportioned gross receipts tax may be imposed by a state, consistent with the Commerce Clause, on the proceeds of transactions in which title to a commodity passes after it is delivered to a common carrier for transportation to another state.*

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*All the parties are named in the caption. Appellant Pittsburg & Midway Coal Mining Co. is a wholly-owned subsidiary of Gulf Oil Corporation. Affiliates of P&M that are corporations less than wholly owned by Gulf or a subsidiary are listed in Appendix G.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals of New Mexico is reported at 660 P.2d 1027 and is reproduced as Appendix B, pages 20a-44a, below. The decision and order of the Revenue Division of the New Mexico Taxation and Revenue Department (App. A, pp. 1a-19a, *infra*) is not reported. The Supreme Court of New Mexico wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals of New Mexico was entered on February 3, 1983.[1] A timely-filed motion

[1] There is no separate judgment. The opinion, which concludes, "The decision and order of the [Taxation and Revenue] Department

for rehearing was denied on February 21, 1983. (App. C, p. 45a, *infra*.) The Supreme Court of New Mexico granted a petition for a writ of certiorari (App. D, pp. 46a-48a, *infra*) but later quashed the writ on May 3, 1983 (662 P.2d 645; App. E, p. 49a, *infra*). A notice of appeal was filed in the Court of Appeals of New Mexico on July 25, 1983. (App. F, pp. 50a-51a, *infra*.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). In the proceedings below the appellant drew in question the validity of N.M. Stat. Ann. § 7-9-4 on the ground that it is repugnant to the Commerce Clause as applied to impose a tax on the transactions involved in this case, and the decision of the Court of Appeals of New Mexico was in favor of the validity of the statute as so applied. Numerous decisions sustain the jurisdiction of this Court to hear such a case on appeal. *E.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article 1, Section 8, Clause 3, provides:

> "The Congress shall have Power . . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."

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is affirmed. Appellate costs shall be paid by the Taxpayer. IT IS SO ORDERED" (p. 44a, *infra*), stands as the judgment under the New Mexico practice.

Section 7-9-4 of the New Mexico Statutes Annotated provides:

> "A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico.
>
> "B. The tax imposed by this section shall be referred to as the 'gross receipts tax.' "

STATEMENT

New Mexico's "gross receipts tax," N.M. Stat. Ann. § 7-9-4, a privilege tax measured by the total gross receipts of a company doing business in New Mexico, has been sustained by the New Mexico courts in its application, without apportionment, to the proceeds of interstate sales of coal effected by the delivery of the coal to a rail common carrier in New Mexico for transportation to Arizona and other states. In sustaining the tax, the New Mexico Court of Appeals ignored the line of cases beginning with *Coe* v. *Errol*, 116 U.S. 517 (1886), and extending through *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974), that condemn such an application of such a tax statute and misapplied the four-part test of the validity of state taxes on interstate transactions set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977).

Appellant, The Pittsburg & Midway Coal Mining Co. (P&M), operates a coal mine in New Mexico known as the McKinley Mine. P&M is a Missouri corporation whose principal office is in Denver. The substantial majority of the coal produced from P&M's McKinley Mine in New Mexico is sold to out-of-state customers for use outside New Mexico, principally to Arizona utilities. Contracts with these companies provide for the delivery of coal

f.o.b. to a rail common carrier at the McKinley Mine to be transported to Arizona for use in Arizona power plants. (Pp. 3a-5a, *infra*.) The contracts were negotiated and executed outside of New Mexico, and payments under them are made to P&M in Denver.[2] (Rec., vol. I, pp. 125-27, 147; vol. II, pp. 13, 40, 47.) Some additional coal from the McKinley Mine is sold to other out-of-state purchasers and a small amount to a few New Mexico purchasers.

At issue here is only the tax on receipts from out-of-state sales effected by the delivery of coal to a common carrier for transportation to out-of-state customers. In December 1979, the Revenue Division of the Taxation and Revenue Department of the State of New Mexico assessed P&M more than $5 million for gross receipts taxes on transactions in coal since 1973 with interest and penalties. P&M protested the assessment. An evidentiary hearing was held on the protest before a Revenue Division hearing examiner. At the outset of the hearing P&M challenged the constitutionality of applying the unapportioned gross receipts tax to what counsel described as "solidly interstate transactions." (Rec., vol. I, p. 15.)

The evidence at the hearing consisted principally of six contracts for the sale of coal by P&M to its Arizona customers, mainly utilities. Under each such contract, title to the coal and the risk of loss passed from P&M to the customer after the coal was loaded into the cars of a

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[2] The New Mexico taxing agency found through its hearing examiner that the contracts "were negotiated and executed in various states, including New Mexico," and that "billings . . . and the receipts of payments were effected in . . . New Mexico and Colorado." (P. 7a, *infra*.) There is no record support for a finding that any of the contracts were negotiated or executed in New Mexico or that payments were made in New Mexico.

freight train operated by the Atchison, Topeka & Santa Fe Railway. (Pp. 3a-7a, *infra*.) Once the coal was loaded into the freight cars, it was in the custody and control of the Santa Fe until it reached the buyer's Arizona power plant. Although title and the risk of loss were in the purchaser during the coal's interstate journey by rail, each transaction was subject to post-delivery price adjustments, based on differences between the weight of the coal as first recorded by P&M in New Mexico and the weight of the coal as recorded by the buyer in Arizona and between the quality of the coal as revealed by the buyer's tests and a quality specified in the contract.[3]

The hearing examiner was also informed that Arizona assessed an unapportioned 4 percent use tax on P&M in respect of the sales of coal to the Arizona companies. (P. 7a, *infra*.) Between January 1, 1973, and December 31, 1976, P&M paid use taxes to Arizona totaling about $1.4 million and an additional $3.4 million in the next two and a half years. P&M also showed that it made substantial tax payments to New Mexico, including severance and production taxes, gasoline and diesel fuel taxes, property and franchise taxes, and, where interstate commerce was not involved, gross receipts taxes. In 1981 alone, the company paid New Mexico $9.4 million in such taxes.

The Revenue Division's hearing examiner sustained the New Mexico tax assessment. He held that, since title to the coal passed to the out-of-state purchasers upon delivery of the coal to the common carrier and since the carrier was the agent of the purchaser for the purpose of determining where delivery was made, the transactions

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[3] There was no finding on the post-sale adjustments for weight and quality, but the evidence on the point is uncontroverted. (Rec., vol. I, pp. 147-50.)

were intrastate. He further held that, even if the transactions were interstate sales, the four-part test laid down in this Court's opinion in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), was satisfied. (Pp. 10a-17a, *infra*.) The examiner's decision is by statute the agency's decision. N.M. Stat. Ann. §§ 7-1-25, 7-1-24(H).

P&M sought review of the agency decision in the New Mexico Court of Appeals. That court affirmed the hearing examiner's decision and order. (Pp. 42a-44a, *infra*.) It ruled that the passage of title in New Mexico was "a positive factor upon which to determine that the tax does not interfere with the Commerce Clause of the U.S. Constitution." (P. 36a, *infra*.) It also agreed with the hearing examiner that the railroad was acting as agent for the buyer in taking on the coal, and it ruled that this was "an important factor for determination of this matter." (P. 37a, *infra*.) But it did not in so many words rule that the transactions were intrastate transactions. Its decision seemed to rest ultimately on a judgment that the New Mexico tax satisfied the four-part test of *Complete Auto Transit, Inc.* v. *Brady;* on this analysis, the passage of title and the purported agency relationship merely went to the satisfaction of the first part of the four-part test, the requirement that the transactions have a substantial nexus with the taxing state. (Pp. 37a-38a, *infra*.) The court held also that the other *Complete Auto* requirements of fair apportionment, absence of discrimination against interstate commerce, and relationship of the tax to services provided by the state were satisfied, even though the New Mexico tax is not apportioned as it applies to interstate transactions. (Pp. 38a-42a, *infra*.) The court did not discuss the settled rule that traces to *Coe* v. *Errol*, 116 U.S. 517 (1886), that delivery of a commodity to a common carrier for transportation in interstate com-

merce renders the commodity and the transaction that placed it in commerce immune from the usual taxation power of the state of origin.[4] Following the denial of a motion for rehearing (p. 45a, *infra*), P&M filed a petition for a writ of certiorari in the New Mexico Supreme Court. This petition was granted, but by a subsequent order the New Mexico Supreme Court reversed itself and quashed the writ as having been improvidently granted. (Pp. 46a-49a, *infra*.)

THE QUESTION PRESENTED IS SUBSTANTIAL

In an unbroken line of cases that begins with *Coe* v. *Errol*, 116 U.S. 517 (1886), and continues through *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974), this Court has held that, when goods are delivered to a common carrier destined for an out-of-state point, both they and the transaction that resulted in their delivery to the carrier are beyond the usual power of the state of origin to tax because the goods are in interstate commerce or, if the destination point is abroad, are exports. The court below failed altogether to take account of this line of cases in deciding that New Mexico's gross receipts tax could constitutionally be applied to a transaction that results in the delivery of coal at a New Mexico mine to a common carrier by rail that is committed to transporting the coal to a point outside of New Mexico where the purchaser takes possession of it and puts it to use.

The court below may have believed that the *Coe* v. *Errol* line of cases no longer states good Commerce Clause law. But if that is to be so, it is for this Court and

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[4] The only reference by the court below to *Coe* v. *Errol* and to the latest in the *Coe* v. *Errol* line of cases, Kosydar v. National Cash Register Co., 417 U.S. 62 (1974), is in a long quotation from another state court's opinion. (P. 35a, *infra*.)

not the New Mexico Court of Appeals to say so. This Court has not said so. In particular, it did not say so in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), on which the New Mexico court heavily relied. Nor does *Complete Auto* imply that the rule of *Coe* v. *Errol* cannot stand consistently with the more recent decision. In any event, if the four-part test for conformity of a state tax with the Commerce Clause stated in *Complete Auto* is to be taken as the sole test of the constitutionality of taxes on all interstate transactions, to the exclusion of any bright-line rules such as the rule of *Coe* v. *Errol* applicable to certain readily identifiable and recurring interstate transactions, the New Mexico tax does not satisfy at least two parts of the four-part test. The New Mexico tax is unapportioned. It thereby creates a threat of multiple taxation that may be realized in P&M's case. For that same reason, it discriminates against interstate commerce.

Those, in summary, are the considerations that make the question that P&M presents substantial.

1. In *Coe* v. *Errol* the issue was the constitutionality of a New Hampshire town's levy of a property tax on logs resting in a stream within the town waiting to be floated down the Androscoggin River to Lewiston, Maine. This Court held that the tax was not barred by the Commerce Clause. In doing so, it laid down an enduring rule that has come to govern cases under the Commerce Clause and under the two export clauses of the Constitution, Art. I, § 9, cl. 5; Art. I, § 10, cl. 2. Goods intended for exportation to another state "do not cease to be a part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another State, or have been started

upon such transportation in a continuous route or journey." 116 U.S. at 527.

That goods that have been "shipped or entered with a common carrier for transportation to another State" are not subject to the originating state's usual power of taxation has been unquestioned in the nearly 100 years since *Coe* v. *Errol* was decided. Similarly, if goods are so shipped or entered for transportation to a foreign point, they are exports beyond the taxing power of a state under the Import-Export Clause or, under clause 5 of Section 9 of Article I, the taxing power of the United States. The cases in which the reach of *Coe* v. *Errol* has been tested have concerned principally whether something less than shipment or entry with a common carrier suffices to exempt goods destined for another state or foreign country from taxation. The basic rule laid down in *Coe* v. *Errol* has invariably been reaffirmed in those cases.

Among the cases are *Empresa Siderurgica, S.A.* v. *County of Merced*, 337 U.S. 154 (1949), and *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974). In each of those Import-Export Clause cases, a claim of immunity for goods that apparently were to be exported but had not yet been placed in export channels was denied. In *Kosydar*, the Court described *Coe* v. *Errol* as "[t]he seminal case on the subject" and quoted, with italicized emphasis, the passage from the *Coe* v. *Errol* opinion quoted just above. 417 U.S. at 66-67. The taxpayer's claim in *Kosydar* was denied because the goods that were being taxed were in the taxpayer's hands, not yet committed to a common carrier or otherwise placed in an export channel. Similarly, in the *Merced County* case, where the Court sustained local taxation of a cement plant that had been sold to a Colombian corporation for export to South America, the Court quoted the same passage and said that the test of

Coe v. *Errol* "was fashioned to determine the validity under the Commerce Clause of a nondiscriminatory state tax." 337 U.S. at 156.

State Tax Comm'n v. *Pacific States Cast Iron Pipe Co.*, 372 U.S. 605 (1963) (per curiam), illuminates the rule from another angle. The Court there sustained application of the Utah sales tax to sales to out-of-state buyers who picked up the goods in their own equipment. That decision was made in reliance on *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 405 (1944), where, as the Court said, it had held that a state may levy and collect a sales tax in such a situation "since the passage of title and delivery to the purchaser took place within the State." 372 U.S. at 606. The Court was careful to describe the precise nature of the sales that were at issue and to contrast the taxpayer's more typical sales, concededly immune from the Utah tax, where "interstate delivery is usually made by common carrier or in respondent's own equipment." Id. at 605. The Utah Supreme Court had said that it was "conceded that had the [goods] been delivered to a common carrier consigned to an out-of-state purchaser, the sale would not have been taxable in Utah." *Pacific States Cast Iron Pipe Co.* v. *State Tax Comm'n*, 13 Utah 2d 113, 369 P.2d 123 (1962).

Although *Merced County* and *Kosydar*, like *Coe* v. *Errol*, involved state ad valorem property taxes, the rule of *Coe* v. *Errol* is not limited to such taxes. The *Pacific States* case, a sales tax case, so demonstrates. A leading case is *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923), where the Court invalidated a wartime federal sales tax for repugnance to the prohibition of taxes on exports from a state found in Article I, Section 9. And the tax in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), was a California tax on the privilege of

doing business in California measured by gross receipts—indistinguishable from the New Mexico tax applied to P&M's coal transaction. In the *Richfield* case—an Article I, Section 10, export case—the Court applied the rule of *Coe* v. *Errol* to invalidate the application of California's tax to a sale of oil effected by delivery to a foreign governmental purchaser's own naval tanker: "[i]t would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point." 329 U.S. at 83.[5]

Richfield—and *Spalding* as well—are foursquare with this case in holding that the transactions in issue were in foreign commerce (and would have been in interstate commerce) because in both of them the sales transaction was completed and the title to goods passed when they were delivered to the transporting vessel, just as in this case the sale was completed and title passed upon the loading of the coal into the cars of the Santa Fe train. It was possible in those cases to regard the important incidents of the sale as having occurred within the state of origin and thus to regard the tax as on a local incident and not on an export. Justice Black, dissenting alone in *Richfield*, urged that the tax should be so regarded so as not to

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[5] In *Richfield*, the Court professed to reserve the question of the validity of the tax under the Commerce Clause, saying that "[t]he two constitutional provisions, while related, are not coterminous." 329 U.S. at 75. But the Court's reliance in making its decision on *Coe* v. *Errol*, which it described as "a case under the Commerce Clause," *id.* at 79, suggests that there was no real doubt how the reserved question would have been answered. Indeed, Justice Douglas, who wrote the Court's opinions in both *Richfield* and Empresa Siderurgica, S.A. v. County of Merced, 337 U.S. 154 (1949), said in the latter—and later—opinion that the rule of *Coe* v. *Errol* "is equally applicable" to cases arising under the Commerce Clause, the Import-Export Clause and the Export Clause of Art. I, § 9.

deprive California of revenue. *Id.* at 86-90. But the Court ruled that the sale of the oil was not properly to be regarded as a local taxable incident. Rather, it said, "[t]he incident which gave rise to the accrual of the tax was a step in the export process." *Id.* at 84. Similarly, in the *Spalding* case Justice Holmes said for the Court: "The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods." 262 U.S. at 69.

Thus, the passage of title within New Mexico, of which the court below made so much (pp. 34a-36a, 38a, 42a, *infra*), is of no moment. It was not a local taxable incident but "a step in the export process." Likewise, it is immaterial that some of the cars that composed the Santa Fe trains were owned by a purchaser/shipper—the New Zealand Government surely owned its own naval tanker in *Richfield*—or that the services of the railroad were engaged by the purchaser and not the seller.[6]

If the cases discussed above still state the law of the Commerce Clause, then the decision below does not merely raise a substantial question, it is plainly wrong.

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[6] The court of appeals made the broad assertions that "[t]he cars in which the coal was loaded were owned by the buyer" and that "buyers owned the hopper cars." (Pp. 34a-36a, *infra*.) The evidence and the hearing examiner's finding were much more limited. One customer—not all customers—owned coal hopper cars, which moved in a Santa Fe train powered by Santa Fe locomotives and manned by Santa Fe personnel, housed in a Santa Fe caboose. (P. 4a, *infra*.) The court of appeals also made the puzzling statement that "[t]here was no evidence that . . . a common carrier was employed." (P. 36a, infra.) Taken literally, this statement contradicts the hearing examiner's findings and the undisputed evidence of record. To be

2. The Court's recent decisions liberating the states' taxing powers from some of the more formal restraints imposed in the name of the Commerce Clause do not necessarily mean that *Coe* v. *Errol* and the cases following it are not still good law. The court below relied heavily on *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), an important one of these liberating decisions. (P. 37a, *infra*.) Important as it is, *Complete Auto* does not profess to undo all prior state taxation doctrine. Neither does the case that followed it, *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). What those cases unquestionably do is to overrule *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), with its highly formalistic rule that a tax on the privilege of doing business in a state is invalid if the taxpayer's business is entirely an interstate business, even though a differently labeled tax with exactly the same economic consequences would be valid. Thus, that particular branch of Commerce Clause doctrine, which had fallen behind the times, was aligned with the modern idea that interstate commerce can be made to pay its way.

Those cases do not, however, purport to resolve the intricacies of the relationship between a state of sale and a state of purchase or—at a different conceptual level—the relationship between the Commerce Clause and the export clauses that are involved in applications of the rule of *Coe* v. *Errol*. Scholars who have hailed the liberating

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generous, the court may have meant by the statement only that the buyer arranged for transportation by common carrier. That fact is quite irrelevant, and the court's whole discussion of agency is beside the point. For purposes of the rule of *Coe* v. *Errol* it is delivery to a common carrier that is significant, and it does not matter whether the consignor or the consignee arranged for the transportation or ordered the carrier's services.

effect of the recent cases have pointed to problems of possible multiple taxation that remain when sales are made across state lines and two or more states seize on incidents of the sale as subjects of taxation. *See, e.g.*, Lockhart, *A Revolution in State Taxation of Commerce?*, 65 Minn. L. Rev. 1025, 1047-54 (1981).

Only this Court can authoritatively resolve those problems.

3. The very narrowest proposition for which *Coe* v. *Errol* and the cases following it stand is that sales such as the coal sales in this case are sales in interstate commerce. The court below may have accepted that minimum effect of this Court's decisions. Its discussion of the passage of title in New Mexico and of the carrier's acting as agent for the buyer in taking on the coal in New Mexico did not lead it forthrightly to conclude that the sales were intrastate sales. (P. 6, *supra.*) And they clearly were not. Furthermore, this Court has ruled that, even where technically all the incidents of a taxed transaction are confined to the taxing state, if the transaction nevertheless affects interstate commerce, under the modern law of the Commerce Clause the tax is valid only if it satisfies Commerce Clause standards. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 614-17 (1981).

Thus, on any view of the matter, if the sales are not immune from the New Mexico tax by virtue of the rule of *Coe* v. *Errol*, that tax can validly be applied to proceeds of the sales only to the extent that it satisfies the four-part *Complete Auto* test for the validity of a state tax on interstate commerce. Indeed, that is how the court below seems to have treated the matter. Such a state tax is valid, the Court said in *Complete Auto*, "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate

against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

The New Mexico tax fails that test. We can leave to one side the nexus and state services branches of the test. For there can be no serious claim that New Mexico's tax is apportioned at all, let alone fairly. To the interstate transaction by which New Mexico coal is sold for use in firing Arizona power plants, New Mexico would apply the same 3-3/4 percent tax on all the gross receipts from the sale that it applies to a sale all of whose incidents are in New Mexico. The court of appeals reasoned from its belief that "the delivery and sale of the coal was consummated within the borders of New Mexico" to the conclusion that a tax on the entirety of the gross receipts from the sale was fairly apportioned. (P. 39a, *infra*.) But that is no reasoning at all. It is rather to make the "nexus" and relationship to state-provided services prongs of the test swallow the fair apportionment prong. And the ultimate conclusion of that line of reasoning is that there is no separate fair apportionment requirement. This Court of course did not mean to lay down a requirement that turns out not to be any requirement at all.

The inadequacy of the New Mexico court's treatment of the apportionment requirement is demonstrated by what is happening to P&M. Rightly or wrongly, Arizona is claiming that its interest in these same interstate transactions entitles it to apply its 4 percent use tax to the entire sales price of the coal, *i.e.*, to the entire gross receipts from the sale of the coal, and collect that amount from P&M. And Arizona is not without support. In *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964), relied on below (pp. 38a-39a, *infra*), this Court allowed an unapportioned gross receipts tax to be imposed by the state of the buyer-party to an interstate transaction. Certainly

there are incidents of sale that belong to Arizona: the buyer's taking of dominion over the coal, the final determination of the precise measure of the buyer's obligation to pay (p. 5, *supra*), and, of course, the use of the coal. To be sure, P&M is protesting the Arizona tax, the burden of the tax can possibly be laid off on the buyer (just as the New Mexico gross receipts tax must be passed through to customers if P&M is to remain in business at a profit), and there is an ambiguous Arizona statutory provision that may allow crediting the New Mexico tax against the Arizona tax. Ariz. Rev. Stat. Ann. § 42-1409.A.2. But that does not affect the principle: both states should not have the power to lay unapportioned taxes on the same transaction.

The laying of two or more unapportioned state taxes on the same transaction results in discrimination against interstate commerce, in further violation of the *Complete Auto* test. Years ago, Justice Rutledge, concurring in *Freeman* v. *Hewit*, 329 U.S. 249 (1946), explained how unapportioned gross receipts taxes discriminate against interstate commerce: "[M]ultiple state taxation of gross receipts, although by nondiscriminatory taxes of general applicability, does compel [interstate trade] to bear a heavier tax burden than local trade in either state. The cumulative tax burden is in effect discriminatory, involving in any practical view, the exact effects of a single discriminatory tax." 329 U.S. at 277. For this reason, a state must structure its tax so that it "does not lend itself to repeated exactions in other states. Otherwise intrastate commerce may be preferred over interstate commerce." *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 87 (1948).

It is too late in the day, of course, for P&M to assert that the interstate transactions with which this case is

concerned are not subject to taxation by any state. P&M's posture of resisting the exactions of both New Mexico and Arizona was not assumed by choice. Neither state chose to defer to the other, and P&M could not know for sure which state's claim deserved to be honored. It is for this Court to decide by which state and, if by more than one, in what proportions the transactions may be taxed. The New Mexico Court of Appeals did not even begin to consider those issues. This Court should.

We believe that a decision not to permit taxation by New Mexico is counseled, if not dictated, by authority even if *Coe* v. *Errol* is disregarded. In holding that the same New Mexico gross receipts tax with which we are concerned here could not constitutionally be applied to out-of-state sales, *Evco* v. *Jones*, 409 U.S. 91, 93-94 (1972), the Court quoted an earlier case:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." *J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938).

Based on this precedent and the cases permitting the buyer's state to impose a sales or use tax in such a situation, Professor Lockhart has suggested that a rule of apportionment in accord with the criteria of *Complete Auto* has in effect been established. The rule is that the buyer's state may tax and the seller's state may not. This rule of apportionment reconciles the decided cases and

satisfies the "practical effect" criteria of the Court's recent decisions. Lockhart, *supra*, 65 Minn. L. Rev. at 1048-49.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

BEFORE THE DIRECTOR OF THE REVENUE DIVISION
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF PITTSBURG AND MIDWAY COAL MINING COMPANY, I.D. NO. 765016 TO ASSESSMENT NO. 151392, DOCKET NO. 80-02-05.

DECISION AND ORDER

I.

A.

This matter came on for a hearing before John E. Owens on May 4, 5, and 6 1982, and continued pending the receipt of briefs. Pittsburgh and Midway Coal Mining Company (hereinafter referred to as "Taxpayer" or "Coal Company") was represented by John Pound, Esq. The Taxation and Revenue Department ("Department" or "Revenue Division") was represented by Edward F. Barnicle, Jr., Esq.

On the basis of all the evidence presented, it is decided and ordered that:

1. The Taxpayer is a Missouri business for-profit corporation which maintains its principal office at Denver, Colorado. The Coal Company, authorized to do business in the State of New Mexico, is engaged in the business of mining and selling coal from properties within the County of McKinley, State of New Mexico.

2. The Revenue Division conducted an audit of the Coal Company's operations and properties in McKinley County, New Mexico, and of some of the Company's books of account at Denver, Colorado, during the months of September through November, 1979.

3. During the course of the audit, the Coal Company furnished some of its business records to the auditors for examination. The auditors requested access to additional records of the Coal Company, some of which were furnished and others of which were withheld. Upon completion of the audit, the Revenue Division furnished a copy of the audit report to the Coal Company.

4. As a result of said audit, and some additional investigatory work, the Revenue Division issued Assessment No. 151392 dated December 31, 1979 (Department Exhibit A) for the period commencing on January 1, 1973 and extending to June 30, 1979 for New Mexico gross receipts tax in the amount of $4,922,834.72, for New Mexico compensating tax in the amount of $847,967.28, for penalty in the amount of $567,073.52, and for interest through November 25, 1979 in the amount of $517,260.22; totaling $6,755,135.74; all pursuant to Chapter 7, Articles 1 and 9 NMSA 1978.

5. Thereafter the Revenue Division issued abatements of $30,941.35 against the New Mexico gross receipts tax assessed, $4,530.03 against the New Mexico compensating tax assessed, $5,381.72 against the penalty assessed and $12,397.35 against the interest assessed.

6. The Coal Company paid the Revenue Division $14,364.07 on account of New Mexico compensating tax assessed, and $3,481.64 on account of interest assessed.

7. The remaining amounts of the assessment, unabated and unpaid, are $4,791,893.34 for New Mexico gross receipts tax, $829,073.18 for New Mexico compensating tax, $561,691.80 for penalty, and $501,381.23 for interest through November 25, 1979; totaling $6,684,039.58. All of the Coal Company's liability, if any, for the taxes, penalty, and interest included within Assessment No. 151392 was incurred as a result of the Coal Company's activities in employing labor and equipment for the severance and removal of coal and its crush-

ing, screening, blending, sale, and loading of said coal all within the County of McKinley, State of New Mexico.[1]

8. The Coal Company filed a timely protest to Assessment No. 151392.

B.

1. The Coal Company protested the assessment of New Mexico gross receipts tax upon the basis that it had been denied deductions for receipts from sales of coal which, it claims, were transactions in interstate commerce. The Taxpayer relies on §§ 72-16A-14.10 NMSA 1958 and 7-9-55 NMSA 1978 and Gross Receipts Tax Regulation 3(F):10.

2. The assessment of additional gross receipts taxes is predicted upon the inclusion in the gross receipts from sales made by the Taxpayer from its McKinley mine to out-of-state customers, primarily those located in the State of Arizona. Those sales were all made f.o.b. McKinley Mine, McKinley County, New Mexico, with title passing to the out-of-state customer when the coal is loaded into conveyances at the mine.

3. In support of its position the Taxpayer introduced into evidence six "Coal Agreement Contracts"—with five Arizona customers—which contracts provided for the furnishing of a given supply of coal at a particular rate of delivery for an extended period of time. The most discussed contract, with supplements, was the one with Arizona Public Service Company ("APS") where APS contracted to acquire coal for its electric generation station at Cholla, Arizona. The contract was negotiated over a prolonged period of time. Negotiations were conducted in Phoenix, Kansas City, Chicago and other places. Testimony does not show where the contract was signed by the parties. Under that contract, there was a contractual guarantee to APS that the Taxpayer had sufficient coal to meet the requirements of the purchaser and it provided

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[1] These figures are based on the Department's proposed finding of fact. The Taxpayer's figures are slightly different.

that the Taxpayer would not in the future subsequently contract to sell coal to others that would reduce the amount of coal remaining for APS. To this end, the Taxpayer formally dedicated a geographic area portion of its McKinley coal mine to this particular customer. The contract provided that all coal delivered by the Taxpayer to APS shall be supplied from the Taxpayer's McKinley mine and title to all coal supplied shall pass to APS when coal is loaded in rail cars at the mine. The contract gave APS the right to change the point at which title to the coal passes and a supplement provided that APS shall have the right to divert coal to the Four Corners generating station in New Mexico. Apparently, APS never has diverted coal to the Four Corners Plant nor has it changed the place where title passes. APS also had the right, acting as agent for the Taxpayer, to sell coal to others.

4. Three of the coal agreement contracts with Arizona customers (including APS) provided for "unit train" transportation, apparently because of the volume of coal being transported. A unit train is a train which, as a whole, stays as a unit. The locomotives, hopper cars and caboose remain as a unit. The train as a unit comes to the coal mine where coal is loaded in the hopper cars, the train goes to its destination where the cars are unloaded and the train returns to the mine. At the mine, there is a spur or a loop track which enables the train to turn around. These customers negotiated with the Santa Fe Railroad the terms and conditions of transporting the coal in unit trains in order to achieve the lowest freight rate. In these cases, the railroad company owns the locomotives and cabooses used in the unit trains but, because of the economics involved, the customers apparently own the hopper cars in the unit trains. The customers pay the railroad for the transportation service.

5. At sometime, and it is not clear when, the Taxpayer constructed, or had constructed, facilities to sample, weigh, and load coal into unit trains.[2] These facilities included a coal

[2] Testimony given indicates it was after 1975.

storage area located between the mine operation and the loading operation. The storage area could contain as much as one hundred thousand tons of coal. When the unit train arrives, the coal is drawn from the storage area mechanically and by gravity to a belt. The belt leads to a vertical loading device which is mounted above the track where the train comes in. The cars pass under the loader which loads the railroad car. As part of the delivery process, coal passes over certain scales of weighing mechanisms prior to being placed in the car.

6. Prior to the time the Taxpayer had facilities for loading unit trains, all deliveries of coal were made at the Taxpayer's original loading site. At that facility, coal was loaded into hopper cars and the loaded cars remained in the area until the Santa Fe railroad picked up the car or cars. If, after cars are loaded, a specific customer is unable to accept the loaded cars, the cars can be sent to a different customer. The evidence does not show how long the loaded cars remained in the area before the railroad moved out the car or cars. This original loading site apparently was used for all loading other than loading unit trains.

7. Three of the contracts introduced into evidence (which involved two Arizona purchasers) did not call for unit train loading and under these contracts the loading occurred at the original loading site. These contracts provided that title to coal passed from the seller to the buyer at the time the hopper cars were loaded. In at least one occasion, cars loaded for the Flintkote Co. were diverted from a Flintkote plant to an APS operation in Arizona.

8. In addition to sales made under the six contracts introduced in evidence, the Taxpayer made extensive sales to others some of whom were out of New Mexico and out of Arizona customers. In such cases, coal was loaded at the original loading site into hopper cars or trucks. With one exception, title passed from seller to buyer when the car or truck was loaded. The evidence does not show the number of sales, or the applicable periods of time when sales occurred, in connection with these other sales.

9. At the hearing the Taxpayer gave estimates of sales of coal to its customers but the evidence does not show the amounts received from such sales or the applicable periods of time when sales of coal occurred in connection with unit trains.

10. (a) In summary, the Coal Company loaded all of the coal which it severed and sold from lands within McKinley County, New Mexico into conveyances at the site of the Coal Company's mining operations within McKinley County, New Mexico. The conveyances consisted of trucks and railroad cars. None of the conveyances were owned or controlled by the Coal Company, or by any person, firm or corporation having common ownership or a parent-subsidiary relationship with the Coal Company. Arrangements for the provision of the conveyances to receive the coal were made by the buyers of the coal. All of the charges for use of the conveyances and for the transportation of the coal away from the Coal Company's mining site were paid by the buyers of the coal.

(b) After the Coal Company loaded said coal sold into said conveyances, the conveyances were removed from the Coal Company's premises in McKinley County, New Mexico by others than the Coal Company, and were thereafter transported by others than the Coal Company to other places specified by the buyers of the coal, some within and some beyond the State of New Mexico. Some of the coal was transported to locations within the States of Missouri, Texas, Arizona and California, as well as to other locations within the State of New Mexico.

(c) The Coal Company sold all, or virtually all of its coal, upon written contracts and not oral contracts. Six such contracts were admitted into evidence. Each of the Coal Company's contracts for the sale of coal which were admitted into evidence provided that the title to all coal sold will pass from the Coal Company to the buyer when the coal is loaded into railroad cars at the Coal Company's mining site in McKinley County, New Mexico; and testimony rendered by witnesses for the Coal Company established that the same provision with

respect to the passage of title to coal sold prevailed in the other contracts referred to but not offered in evidence. The various contracts were negotiated and executed in various states, including New Mexico, and the billings for coal sold and the receipts of payments therefor were effected in the States of New Mexico and Colorado. After the coal sold was loaded into the conveyances, the risks of loss, damage and disappearance of the coal was solely borne by the buyers.

11. The Coal Company paid use taxes to the State of Arizona based upon the value of some of the coal sold at its mining site in McKinley County, New Mexico and thereafter transported into the State of Arizona. The Coal Company did not pay any transaction privilege (commonly known as sales) tax to the State of Arizona. The Coal Company did not pay any sales or use taxes to the States of Missouri, Texas, or California on account of coal sold at its mining site in McKinley County, New Mexico and thereafter transported by the buyers of the coal into those states. The Coal Company billed customers for, and has been reimbursed by the buyers of the coal for said use taxes paid to the State of Arizona.

12. The Coal Company has applied for a refund of the Arizona use taxes paid, and has requested the State of Arizona to withhold action upon that application pending the determination of this New Mexico protest proceeding.

C.

1. The Coal Company protested the assessment of New Mexico compensating tax upon the basis that it had been denied deduction of the 50 percent of the value of its dragline equipment to which it claims to be entitled pursuant to §§ 72-16A-15 NMSA 1953 and 7-9-77 NMSA 1978 and Gross Receipts Tax Regulations 14.17:4 and 62:4.

2. The Coal Company does not contend that any of its dragline equipment upon the value of which New Mexico compensating tax was assessed in Assessment No. 151392 consisted of agricultural implements, farm tractors or aircraft;

nor that any tangible personal property of the nature of a dragline was traded-in or the subject of a trade-in allowance at the time its dragline equipment was bought.

3. Each of the Coal Company's four units of dragline equipment is substantially identical to the others. An example is shown in Taxpayer's Exhibit 5. Each is a huge machine powered by outside sources—electricity. The electricity is furnished by trailing electric cables carrying 6900 volts connected to fixed sources of electric power. Each is equipped with a boom at least 320 feet long with cable hoists to operate a suspended 55 cubic yard bucket capable of containing 260,000 pounds for digging and casting overburden. Each is about 30 stories high and weighs about 6,500,000 pounds. The machines were manufactured by the Bucyrus-Erie Corporation and shipped to the Coal Company's mining site in McKinley County, New Mexico in many pieces and parts. Each machine was assembled and erected out of the pieces and parts at the mining site, and none has ever left the mining site since it was originally assembled. Each dragline has tub-type turntable 58 feet in diameter and large "walking shoes" mounted as outriggers on the sides. Each shoe is about 62 feet long, 10 feet wide and 41 inches in depth. The operating cab, machinery house and boom, rotate on the tub by means of rollers and drive gears to permit the boom to be positioned over the overburden to be moved. The bucket is lowered to the overburden and pulled forward into the overburden by a drag hoist until the bucket is loaded. The maximum digging depth is 158 feet. The bucket is then hoisted, the machine rotates to position the bucket over the spoil pile, and the bucket is tripped to dump the overburden clear of the area being stripped. The overburden can be moved up to 600 feet by rotating the machine 180 degrees between digging and dumping. The dragline is moved by lowering the walking shoes to the ground by means of an eccentric drive, then raising the machine (except the shoes); then the elevated machine is moved horizontally about six feet. After this move, the machine is set back down upon the ground, the shoes are elevated, moved and lowered again. This motion is repeated.

The shoes do not move horizontally on the ground. The machine can be moved in only one direction: backward or the reverse of the direction in which the boom is extended. While the walking shoes are in use, the operator in the machine cannot see the area into which the machine is being moved. All vision of the area, and signals to the operator to proceed or to halt, must be given to the operator by another person who is located a distance of 25 or more feet from the machine, in the direction of movement. The area into which the machine is being moved must be leveled and cleared of obstructions in advance by another machine and another operator. While the machine is being moved, it transports nothing but its operator. The machines are not equipped with odometers, and the Coal Company has no records which reveal the linear distance which any of the machines have been moved. The machine operator cannot operate its boom and bucket to move overburden while the walking shoes are in use. The walking shoes cannot be used while the boom and bucket are in operation. The machine normally digs material at or below the level of the tub and can dump in piles 133 feet above the tub level. This permits removing the overburden from the coal seam in approximately 470 feet wide benches and casting the overburden to one side to allow access to the coal. The maximum rate of speed at which the machine can be moved is 12 feet per minute, or 1/8 of 1 mile per hour; it can also be moved at a lesser rate of speed.

4. The parties stipulated that former G.R. Regulations 14.17:4 and 62:4 were valid regulations of the Department and were in effect until their revocation on March 31, 1981.

5. Gross Receipts Tax Regulation 14.17:4 was renumbered as Gross Receipts Tax Regulation 62:4; their texts were identical. Each has been withdrawn, effective March 31, 1981 and were superseded by Gross Receipts Tax Regulation 62:11. G.R. Regulation 62:4 formerly provided:

> "The items of mining equipment listed below are "vehicles" as that term is used in this section and in Section 7-9-77. Therefore, the fifty percent (50%) deduction provisions of those sections apply to receipts derived from the

sale of or the use of such machines. A trade-in deduction pursuant to Section 7-9-71, if applicable, must be taken before the deduction allowed by this section is computed.

"The following machines are "vehicles" within the meaning of this section and Section 7-9-77:

"Shuttle cars are self-contained mobile mining machines mounted on rubber tire wheels, used to transport broken ore from the ore face in the mine to a loading point, where the ore is loaded into an underground train.

"Undercutting machines are self-contained mobile mining machines mounted on rubber tire wheels. These machines are used to under cut or bottom cut the ore face prior to drilling.

"Mining drills are self-contained mobile mining machines mounted on rubber tire wheels used to drill holes above the undercut prior to shooting.

"Loading machines are self-contained mobile mining machines mounted on tractor treads and are similar to front end loaders. They are used to loan ore into shuttle cars.

"Electric shovels are self-contained mobile mining machines mounted on tractor treads and are used in open pit mining operations to load ore and waste material into dump trucks.

"The following machines are not "vehicles" within the meaning of this section and Section 7-9-77:

"Diesel locomotives operated on rails used in underground mining operations.

"Cars used with diesel locomotives in underground mining operations."

II.

A.

In State Board of Equalization v. Blind Bull Coal Co., ____ Wyo. ____, 101 P.2d 70 at 72 (1940), the Wyoming Supreme

Court gave examples of activities that precede interstate transportation and which were treated as taxable local events:

> "The generation of electricity though the generation and interstate transmission were practically instantaneous (Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038); the production of natural gas that passed into interstate commerce by continuous movement from the wells (Hope Natural Gas Co. v. Hall, 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049); the mining of ore that passed at once into the channels of interstate commerce to fill existing contracts with customers outside the state (Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929); a sale of gasoline either for immediate use in interstate commerce (Eastern Air Transport v. South Carolina Tax Comm., 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673), or for immediate transportation to another state (Superior Oil Co. v. Mississippi, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504)."

In the instant case, the Coal Company performed all of its contractural obligations wholly within the State of New Mexico and all of its functions were performed prior to transportation began. Accordingly, the Taxpayer's gross receipts should be considered to be receipts from local—intrastate rather than interstate transactions and thus taxable by New Mexico.

There is no question in this case about where title passed. In every instance, title passed to the buyer when coal was loaded, in car or truck, in New Mexico. As to where delivery occurs, we are guided by Standard Oil Co. of California v. Johnson, 147 P.2d 577 (1944), where the court discussed the question of when delivery occurs. The Court stated, at 580:

> "Whether or not delivery to a carrier constitutes delivery to the buyer depends upon the intention of the parties as ascertained from the contract and the other circumstances of the case, and ordinarily, unless a contrary intent appears, where the seller contracts to deliver goods at a given destination and he delivers them to a carrier consigned to the buyer with freight charges paid by the seller (F.O.B. point of destination), the delivery to the carrier does not constitute delivery to the buyer and title does not pass until the goods have been delivered at there destina-

> tion. * * * * The rule is based upon the theory that in such event the carrier is made the agent of the seller, not the buyer, in transporting the property."

Conversely, where, as here, the purchasers arrange for the mode of transportation, the transporter is the agent for the purchaser. And it is particularly true where, the purchasers arrange for unit train transportation and the hopper cars into which the coal is loaded, are owned by the purchasers.

Where a vendor sells property and passage of title and delivery occur in the vendor's state, that state can levy and collect a tax on that transaction. State Tax Commission of Utah v. Pacific States Cast Iron Co., 372 U.S. 605, 83 S.Ct. 925 (1963). That case seems to be determinative in this case, where in every instance, title passed to the purchaser in New Mexico and the coal was delivered in New Mexico to the purchaser or the agent for the purchaser.

B.

The fact that this Taxpayer paid use taxes to the State of Arizona is significant but not for the reasons advanced by the Taxpayer. National Geographic Society v. California Board of Equalization, 430 U.S. 551, 97 S.Ct. 1386 (1977), made clear that a use tax applies only when sales occur outside the taxing state. "By definition, a use tax is imposed only on sales made out of State." (Blackman J., concurring). In determining that its transactions with its Arizona customers were subject to the Arizona use tax, the Taxpayer recognized that the sale of the coal occurred in New Mexico. In "paying" the Arizona use tax, the Taxpayer was merely paying tax liabilities of its customers—the customers were liable for the use tax and the Taxpayer acted as agent in collecting and paying over the Arizona use tax. All use taxes "paid" by the Taxpayer were reimbursed by its customers.

In this case, the Taxpayer never paid any Arizona tax liability which it incurred. In New Mexico it never has paid any gross receipts taxes on its so-called interstate sales. If it incurs

no tax liability in Arizona on these transactions it is difficult to see why the sales made in New Mexico are not subject to tax in New Mexico.

C.

The Taxpayer cites a number of cases, some of which involve an interpretation of the export clause in the United States Constitution. In Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 at 446, 99 S.Ct. 813 at 1820 (1979), the court rejected the argument that analysis of the commerce clause is identical, regardless of whether interstate or foreign commerce is involved. There the court held that a somewhat different, more extensive constitutional inquiry is required when the issue involves foreign commerce.

The Taxpayer relies on Evco v. Jones, 459 U.S. 91, 93 S.Ct. 349 (1972). But the Evco case involved a situation where the sale of property occurred out-of-state. That case is distinguishable from the present case where the sale of property took place in New Mexico. The Taxpayer also cites Albuquerque Moving & Storage Co. v. Commissioner of Revenue, 82 N.M. 45 (1970), which was concerned with when interstate commerce ends. In the instant case, we are concerned with sales which occur prior to the time interstate commerce begins.

Assuming that the Taxpayer's sales are not intrastate transactions but rather are interstate sales, taxpayer's basic theory "reflects an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation" which theory was rejected in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076 (1977). That opinion reaffirmed the principle that interstate commerce should be made to pay its way.

The most recent Supreme Court decision on interstate commerce is Commonwealth Edison Co., et al. v. State of Montana, ___ U.S. ___, 101 S.Ct. 2946 (1981). There, Montana

imposed a severance tax on coal mined in that state. The coal was sold to out-of-state utilities. The Court said:

> "The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity. See Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 350 97 S.Ct. 2434, 2445, 53 L.Ed.2d 383 (1977); Pike v. Bruce Church, Inc. 397 U.S. 137, 141-142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); Nippert v. City of Richmond, 327 U.S. 416, 423-424, 66 S.Ct. 586, 589-90, 90 L.Ed. 760 (1946). Correspondingly, the Court has rejected the notion that state taxes levied on interstate commerce are per se invalid. See, e.g., Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978); Complete Auto Transit, Inc. v. Brady, supra. In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443, 100 S.Ct. 1223, 1234, 63 L.Ed.2d 510 (1980). See Moorman Mfg. Co. v. Bair, 437 U.S. 267, 276-281, 98 S.Ct. 2340, 2346-48, 57 L.Ed.2d 197 (1978); Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., supra, 435 U.S., at 743-751, 98 S.Ct. at 1395-99; Complete Auto Transit, Inc. v. Brady, supra, 430 U.S., at 277-279, 97 S.Ct. at 1078-79. We conclude that the same 'practical' analysis should apply in reviewing Commerce Clause challenges to state severance taxes.
>
> "In the first place, there is not real distinction—in terms of economic effects—between severance taxes and other types of state taxes that have been subjected to Commerce Clause scrutiny. See, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993 (1947); Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937), both overruled in Washington Revenue Dept. v. Associaton of Wash. Stevedoring Cos., supra. State taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this

effect is the proper focus of Commerce Clause inquiry. See Mobil Oil Corp. v. Commissioner of Taxes, supra, 445 U.S., at 443, 100 S.Ct. at 1234. Second, this Court has acknowledged that 'a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government,' Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., supra, 435 U.S., at 748, 98 S.Ct. at 1398. As the Court has stated, '[e]ven interstate business must pay its way.' Western Live Stock Bureau v. Bureau of Revenue, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938), quoting Postal Telegraph-Cable Co. v. Richmond, 249 U.S. 252, 259, 39 S.Ct. 265, 266, 63 L.Ed. 590 (1919). Consequently, the Heisler Court's concern that a loss of state taxing authority would be an inevitable result of subjecting taxes on 'local' activities to Commerce Clause scrutiny is no longer tenable.

"We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in Heisler and its progeny are disapproved. We agree with appellants that the Montana tax must be evaluated under Complete Auto Transit's four-part test. Under that test, a state tax does not offend the Commerce Clause if it 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.' 430 U.S., at 279, 97 S.Ct., at 1079."

In applying the four-part test announced in Complete Auto Transit to this case, it seems clear that the instant Taxpayer meets the first test. The Taxpayer engaged in the strip mining of coal located in New Mexico; it crushes, screens, blends, and loads coal at its New Mexico mine which New Mexico coal is sold to various customers. This activity in New Mexico clearly establishes the nexus test.

It is also clear that the New Mexico gross receipts tax does not discriminate against interstate commerce. There is only a single tax applied to all who are engaged in business in the state. The tax "is not discriminatory, [because it] places no

greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character." (Justice Rutledge concurring in Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475 (1948)). The sales occur in New Mexico. No one contends that the sales of coal (as opposed to the use of coal) were subject to tax in Arizona. Therefore, it seems clear that the third test is met.

The fourth test is whether the tax is fairly related to services provided by the state. Insofar as the record shows during the audit period, all of the transactions in question involved coal mined, processed, and loaded all within New Mexico. None of these activities were performed by the taxpayer outside of New Mexico.[3] The innumerable services provided by the State of New Mexico to the Taxpayer's coal mine, properties and employees meet the fourth test of Complete Auto Transit.[4]

The remaining question is whether the New Mexico gross receipts tax is "fairly apportioned." The evidence shows that—aside from the negotiating sales contracts which may have occurred outside of New Mexico—all of the Taxpayer's activities were performed in New Mexico. The mining, the on-site transportation by truck and conveyor belts, the crushing, screening and indeed the sale of the coal itself all occurred in New Mexico. The customers acquired title to the coal in New Mexico. As in the Montana case, no other state could impose a gross receipts tax on this taxpayer. Under such circumstances it would seem that the tax is fairly apportioned. Department of Treasury v. Wood Preserving Corporation, 313 U.S. 62, 61 S.Ct. 885 (1941); Standard Pressed Steel Co. v. Washington,

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[3] Although the Taxpayer opened an office in Arizona in 1975, there is no evidence as to what that office did or how long it existed.

[4] "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " Commonwealth Edison v. Montana, 101 S.Ct. at 2959.

419 U.S. 560, 95 S.Ct. 706 (1975). It is held that the Taxpayer's receipts from sales of coal are not exempt or deductible.

III.

The Department contends the Taxpayer "did not prove the amounts of gross receipts which it received from persons to whom it sold coal and which persons it believes to have removed that coal from the State of New Mexico after buying it." The Taxpayer says "the record is confused concerning the exact amounts of [the assessment] which remains in controversy and a final accounting by the parties is required."

The Taxpayer furnished the Department's auditor with production records for the audit period of 1976, 1977, 1978, and the first six months of 1979. The taxpayer permitted the auditor to look at four contracts. The Taxpayer did not furnish the auditor with records prior to 1976. At the formal hearing, the Taxpayer put in evidence six contracts including the four furnished to the auditor. Production records were not placed in evidence. Although information showing sales of coal and the name of the buyers, transaction by transaction, was available to the Taxpayer, such information was not produced at the formal hearing. At the hearing the taxpayer recognized that the record made at the hearing did not give that information. The Taxpayer was given an opportunity to do so, but the Taxpayer decided not to present any additional information.

The Taxpayer failed to establish how much of its gross receipts are exempt, or deductible, from gross receipts. Under the circumstances, it is concluded that the Taxpayer has failed to establish clearly its rights to the claimed deductions or exemptions. Reed v. Jones, 81 N.M. 481 (1970).

IV.

The evidence given at the hearing upon the coal Company's protest with respect to the draglines was clear and uncontroverted. The Coal Company's draglines conform in every material quality and aspect to the draglines described in Kaiser

Steel Corp. v. Revenue Division, 96 N.M. 117, at pp. 120 and 121, 628 P.2d 687 (Ct.App. 1981), cert. denied 96 N.M. 116, except that they are greater in every particular—weight, length, height, capacity—than those described in the Court's opinion. The Court's majority opinion in the Kaiser Steel case considered every argument which can be based upon the authorities cited in the Coal Company's protest and found that the value of dragline mining equipment of this character and magnitude is not subject to deduction for compensating tax purposes. For example, the Court held:

> "From all the foregoing, we find it impossible to conclude that the continuous miner and dragline are 'vehicles' under the Motor Vehicle Code. Accord Gibbons & Reed Company v. Bureau of Revenue, 80 N.M. 462, 457 P.2d 710 (1969).
>
> "Because the machine must, in the first instance, be a 'vehicle' in order to qualify under either exception, see Gibbons & Reed Company v. Bureau of Revenue, supra, and, as shown above, neither the dragline nor continuous miner can be so classified, under § 66-1-4(B)(71), neither are 'vehicles not required to be registered' within the meaning of § 7-9-77. Further, as to the requirements of § 66-3-1(B), a finding that a machine 'moves' or is 'mobile' does not in itself support a conclusion that the machine can be 'driven or moved upon a highway' for any purpose. In fact, the evidence here is to the contrary. Neither the dragline or continuous miner are 'vehicles' exempt from registration under the Motor Vehicle Code.
>
> "A similar case was presented in Gibbons & Reed Company v. Bureau of Revenue, 80 N.M. 462, 457 P.2d 710 (1969), which held that a piece of mining equipment called a 'mole' was not 'special mobile equipment' because it did not come within the general descriptive terms of the section. [§ 64-1-12, N.M.S.A. 1953 Comp., now § 66-1-4(B)(60), N.M.S.A.]. The 'mole' which weighed approximately one hundred tons, was used to move employees and supplies in and out of a tunnel and to remove excavated material from the tunnel.

On the authority of the Court of Appeals' decision in the Kaiser Steel case, the Coal Company's claim for a deduction from the value of its dragline property is denied.

V.

The Taxpayer (or its parent) has a tax department which employs attorneys and accountants. The Taxpayer filed tax reports based on advice from in-house tax advisors. Under the circumstances, unpaid penalties reflected in Assessment No. 151392 are to be abated.

The Taxpayer's protest to the unpaid tax and interest reflected in Assessment No. 151392 is denied. As stated in V above, unpaid penalties are to be abated.

DONE this 27th day of July, 1982, in Santa Fe, New Mexico.

A. B. SNEAD, Director
Revenue Division
Taxation and Revenue Department

/s/By: John E. Owens
JOHN E. OWENS
Hearing Examiner

* * *

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 5910

PITTSBURGH AND MIDWAY
COAL MINING COMPANY,
Petitioner-Appellant,
v.

REVENUE DIVISION, TAXATION
AND REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO,
Defendant-Appellee.

ADMINISTRATIVE APPEAL

FILED
'83 FEB-3 A8:44

* * *

OPINION

LOPEZ, Judge

Pittsburgh and Midway Coal Mining Company (Taxpayer) appeals a decision and order of the Revenue Division of the Taxation and Revenue Department of the State of New Mexico (Department) imposing tax assessments of approximately $6,684,039.58, which includes gross receipt taxes, compensating taxes, penalty and interest. We affirm.

This appeal presents three issues for our determination: 1. The jurisdiction of this court to hear the appeal; 2. The legality of the imposition of the gross receipt taxes and the deductions claimed by Taxpayer; 3. Legality of the compensating tax and the deductions claimed by Taxpayer.

FACTS

In December 1979 the Department assessed Taxpayer for gross receipts and compensating taxes, interest and penalty.

The Department asserted that Taxpayer owed gross receipts taxes on proceeds from the sales of coal to out-of-state buyers during the audit period January 1, 1973 through June 30, 1979. The Department contended that Taxpayer owed compensating taxes for the operation of four draglines at its McKinley County mine during the same period. Taxpayer protested both assessments and requested a formal hearing. An evidentiary hearing was held at the Department's office in May 1982. The Department entered its decision and order in which it found against Taxpayer on all issues except the penalty.

We shall set forth herein all the pertinent findings of the Department:

A.

1. The Taxpayer is a Missouri business for-profit corporation which maintains its principal office at Denver, Colorado. The Coal Company, authorized to do business in the State of New Mexico, is engaged in the business of mining and selling coal from properties within the County of McKinley, State of New Mexico.

2. The Revenue Division conducted an audit of the Coal Company's operations and properties in McKinley County, New Mexico, and of some of the Company's books of account at Denver, Colorado, during the months of September through November, 1979.

3. During the course of the audit, the Coal Company furnished some of its business records to the auditors for examination. The auditors requested access to additional records of the Coal Company, some of which were furnished and others of which were withheld. Upon completion of the audit, the Revenue Division furnished a copy of the audit report to the Coal Company.

4. As a result of said audit, and some additional investigatory work, the Revenue Division issued Assessment No. 151392 dated December 31, 1979 (Department Exhibit A) for the period commencing on January 1, 1973 and extending to June 30, 1979 for New Mexico gross receipts tax in the amount of $4,922,834.72, for New Mexico compensating tax in the amount of $847,967.28, for

penalty in the amount of $567,073.52, and for interest through November 25, 1979 in the amount of $517,260.22; totaling $6,755,135.74; all pursuant to Chapter 7, Articles 1 and 9 NMSA 1978.

5. Thereafter the Revenue Division issued abatements of $30,941.35 against the New Mexico gross receipts tax assessed, $4,530.03 against the New Mexico compensating tax assessed, $5,381.72 against the penalty assessed and $12,397.35 against the interest assessed.

6. The Coal Company paid the Revenue Division $14,364.07 on account of New Mexico compensating tax assessed, and $3,481.64 on account of interest assessed.

7. The remaining amounts of the assessment, unabated and unpaid, are $4,791,893.34 for New Mexico gross receipts tax, $829,073.18 for New Mexico compensating tax, $561,691.80 for penalty, and $501,381.23 for interest through November 25, 1979; totaling $6,684,039.58. All of the Coal Company's liability, if any, for the taxes, penalty, and interest included within Assessment No. 151392 was incurred as a result of the Coal Company's activities in employing labor and equipment for the severance and removal of coal and its crushing, screening, blending, sale, and loading of said coal all within the County of McKinley, State of New Mexico.

8. The Coal Company filed a timely protest to Assessment No. 151392.

B.

1. The Coal Company protested the assessment of New Mexico gross receipts tax upon the basis that it had been denied deduction for receipt from sales of coal which, it claims, were transaction in interstate commerce. The Taxpayer relies on §§ 77-16A-14.10 NMSA 1958 [sic] and 7-9-55 NMSA 1978 and Gross Receipts Tax Regulation 3(F):10.

2. The assessment of additional gross receipts taxes is predicted [sic] upon the inclusion in the gross receipts from sales made by the Taxpayer from its McKinley mine to out-of-state customers, primarily those located in the State of Arizona. Those sales were all made f.o.b. McKinley Mine, McKinley County, New Mexico, with title pass-

ing to the out-of-state customer when the coal is loaded into conveyances at the mine.

3. In support of its position the Taxpayer introduced into evidence six "Coal Agreement Contracts"—with five Arizona customers—which contracts provided for the furnishing of a given supply of coal at a particular rate of delivery for an extended period of time. The most discussed contract, with supplements, was the one with Arizona Public Service Company ("APS") where APS contracted to acquire coal for its electric generation station at Cholla, Arizona. The contract was negotiated over a prolonged period of time. Negotiations were conducted in Phoenix, Kansas City, Chicago and other places. Testimony does not show where the contract was signed by the parties. Under that contract, there was a contractual guarantee to APS that the Taxpayer had sufficient coal to meet the requirements of the purchaser and it provided that the Taxpayer would not in the future subsequently contract to sell coal to others that would reduce the amount of coal remaining for APS. To this end, the Taxpayer formally dedicated a geographic area portion of its McKinley coal mine to this particular customer. The contract provided that all coal delivered by the Taxpayer to APS shall be supplied from the Taxpayer's McKinley mine and title to all coal supplied shall pass to APS when coal is loaded in rail cars at the mine. The contract gave APS the right to change the point at which title to the coal passes and a supplement provided that APS shall have the right to divert coal to the Four Corners generating station in New Mexico. Apparently, APS never has diverted coal to the Four Corners Plant nor has it changed the place where title passes. APS also had the right, acting as agent for the Taxpayer, to sell coal to others.

4. Three of the coal agreement contracts with Arizona customers (including APA) provided for "unit train" transportation, apparently because of the volume of coal being transported. A unit train is a train which, as a whole, stays as a unit. The locomotives, hopper cars and caboose remain as a unit. The train as a unit comes to the coal mine where coal is loaded in the hopper cars, the train goes to its destination where the cars are unloaded and the train returns to the mine. At the mine, there is a spur or loop track which enables the train to turn around. These cus-

tomers negotiated with the Santa Fe railroad the terms and conditions of transporting the coal in unit trains in order to achieve the lowest freight rate. In these cases, the railroad company owns the locomotives and cabooses used in the unit trains but, because of the economics involved, the customers apparently own the hopper cars in the unit trains. The customers pay the railroad for the transportation service.

5. At sometime, and it is not clear when, the Taxpayer constructed, or had constructed, facilities to sample, weigh, and load coal into unit trains. These facilities included a coal storage area located between the mine operation and the loading operation. The storage area could contain as much as one hundred thousand tons of coal. When the unit train arrives, the coal is drawn from the storage area mechanically and by gravity to a belt. The belt leads to a vertical loading device which is mounted above the track where the train comes in. The cars pass under the loader which loads the railroad car. As part of the delivery process, coal passes over certain scales of weighing mechanisms prior to being placed in the car.

6. Prior to the time the Taxpayer had facilities for loading unit trains, all deliveries of coal were made at the Taxpayer's original loading site. At that facility, coal was loaded into hopper cars and the loaded cars remained in the area until the Santa Fe railroad picked up the car or cars. If, after cars are loaded, a specific customer is unable to accept the loaded cars, the cars can be sent to a different customer. The evidence does not show how long the loaded cars remained in the area before the railroad moved out the car or cars. This original loading site apparently was used for all loading other than loading unit trains.

7. Three of the contracts introduced into evidence (which involved two Arizona purchasers) did not call for unit train loading and under these contracts the loading occurred at the original loading site. These contracts provided that title to coal passed from the seller to the buyer at the time the hopper cars were loaded. In at least one occasion, cars loaded for the Flintkôte Co. were diverted from a Flintkote plant to an APS operation in Arizona.

8. In addition to sales made under the six contracts introduced in evidence, the Taxpayer made extensive

sales to others some of whom were out of New Mexico and out of Arizona customers. In such cases, coal was loaded at the original loading site into hopper cars or trucks. With one exception, title passed from seller to buyer when the car or truck was loaded. The evidence does not show the number of sales, or the applicable periods of time when sales occurred, in connection with these other sales.

9. At the hearing the Taxpayer gave estimates of sales of coal to its customers but the evidence does not show the amounts received from such sales or the applicable periods of time when sales of coal occurred in connection with unit trains.

10. (a) In summary, the Coal Company loaded all of the coal which it severed and sold from lands within McKinley County, New Mexico into conveyances at the site of the Coal Company's mining operations within McKinley County, New Mexico. The conveyances consisted of trucks and railroad cars. None of the conveyances were owned or controlled by the Coal Company, or by any person, firm or corporation having common ownership or a parent-subsidiary relationship with the Coal Company. Arrangements for the provision of the conveyances to receive the coal were made by the buyers of the coal. All of the charges for use of the conveyances and for the transportation of the coal away from the Coal Company's mining site were paid by the buyers of the coal.

(b) After the Coal Company loaded said coal sold into said conveyances, the conveyances were removed from the Coal Company's premises in McKinley County, New Mexico by others than the Coal Company, and were thereafter transported by other than the Coal Company to other places specified by the buyers of the coal, some within and some beyond the State of New Mexico. Some of the coal was transported to locations within the States of Missouri, Texas, Arizona, and California, as well as to other locations within the State of New Mexico.

(c) The Coal Company sold all, or virtually all of its coal, upon written contracts and not oral contracts. Six such contracts were admitted into evidence. Each of the Coal Company's contracts for the sale of coal which were admitted into evidence provided that the title to all coal sold will pass from the Coal Company to the buyer when

the coal is loaded into railroad cars at the Coal Company's mining site in McKinley County, New Mexico; and testimony rendered by witnesses for the Coal Company established that the same provision with respect to the passage of title to coal sold prevailed in the other contracts referred to but not offered in evidence. The various contracts were negotiated and executed in various states, including New Mexico, and the billings for coal sold and the receipts of payments therefor were effected in the States of New Mexico and Colorado. After the coal sold was loaded into the conveyances, the risks of loss, damage and disappearance of the coal was solely borne by the buyers.

11. The Coal Company paid use taxes to the State of Arizona based upon the value of some of the coal sold at its mining site in McKinley County, New Mexico and thereafter transported into the State of Arizona. The Coal Company did not pay any transaction privilege (commonly known as sales) tax to the State of Arizona. The Coal Company did not pay any sales or use taxes to the States of Missouri, Texas, or California on account of coal sold at its mining site in McKinley County, New Mexico and thereafter transported by the buyers of the coal into those states. The Coal Company billed customers for, and has been reimbursed by the buyers of the coal for said use taxes paid to the State of Arizona.

12. The Coal Company has applied for a refund of the Arizona use taxes paid, and has requested the State of Arizona to withhold action upon that application pending the determination of this New Mexico protest proceeding.

C.

1. The Coal Company protested the assessement of New Mexico compensating tax upon the basis that it had been denied deduction of the 50 percent of the value of its dragline equipment to which it claims to be entitled pursuant to §§ 72-16A-15 NMSA 1953 and 7-9-77 NMSA 1978 and Gross Receipts Tax Regulations 14.17:4 and 62:4.

2. The Coal Company does not contend that any of its dragline equipment upon the value of which New Mexico compensating tax was assessed in Assessment No. 151392 consisted of agricultural implements, farm tractors or air-

craft, nor that any tangible personal property of the nature of a dragline was traded-in or the subject of a trade-in allowance at the time its dragline equipment was bought.

3. Each of the Coal Company's four units of dragline equipment is substantially identical to the others. An example is shown in Taxpayer's Exhibit 5. Each is a huge machine powered by outside sources—electricity. The electricity is furnished by trailing electric cables carrying 6900 volts connected to fixed sources of electric power. Each is equipped with a boom at least 320 feet long with cable hoists to operate a suspended 55 cubic yard bucket capable [sic] of containing 260,000 pounds for digging and casting overburden. Each is about 30 stories high and weighs about 6,500,000 pounds.

Taxpayer only challenges the portions of Finding A7 which includes "employing labor and equipment for the severance and removal of coal and its crushing, screening, blending, sale, and loading of said coal all within the County of McKinley, State of New Mexico". It challenges D4 and the portion challenged only includes "the customers apparently own the hopper cars and the unit trains." It also challenges portions of B10 which includes "including New Mexico." The following statutes and Department Gross Receipts Regulations (Regulations) are pertinent to our decision in this case:

7-9-4, N.M.S.A. 1978. Imposition and rate of tax; denomination as "gross receipts tax."

A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax."

7-9-7, N.M.S.A. 1978. Imposition and rate of tax; denomination as "compensating tax."

A. For the privilege of using property in New Mexico, there is imposed on the person using property an excise tax equal to three and three-fourths percent of the value, at the time of acquisition or of introduction into the state,

whichever is later, or of conversion to use by the manufacturer of property that was:

(1) manufactured by the person using the property in the state;

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or

(3) acquired as the result of a transaction which was not intitially subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax.

(B) For the privilege of using services rendered in New Mexico, there is imposed on the person using such services an excise tax equal to three and three-fourths percent of the value of the services at the time they were rendered. The services, to be taxable under this subsection, must have been rendered as the result of a transaction which was not initially subject to the gross receipts tax but which transaction, because of the buyer's subsequent use of the services, should have been subject to the gross receipts tax.

(C) The tax imposed by this section shall be referred to as the "compensating tax."

7-9-8, N.M.S.A. 1978. Presumption of taxability and value.

A. To prevent evasion of the compensating tax and the duty to collect it, it is presumed that property bought or sold by any person for delivery into this state is bought or sold for a taxable use in this state.

B. In determining the amount of compensating tax due on the use of property, it is presumed, in the absence of preponderant evidence of another value, that the value means the total amount of money or the reasonable value of other consideration paid for property exclusive of any type of time-price differential. However, in an exchange in which the amount of money paid does not represent the value of the property or property and service purchased,

the compensating tax shall be imposed on the reasonable value of the property or property and service purchased.

C. In determining the amount of compensating tax due on the use of a service, it is presumed, in the absence of preponderant evidence of another value, that the value means the total amount of money or the reasonable value of other consideration paid for the service exclusive of any type of time-price differential. However, in an exchange in which the amount paid does not represent the value of the service purchased, the compensating tax shall be imposed on the reasonable value of the service purchased.

7-9-22, N.M.S.A. 1978. Exemption; gross receipts tax; vehicles.

Exempted from the gross receipts tax are the receipts from selling vehicles on which a tax is imposed by Section 64-11-15 NMSA 1953 and on vehicles subject to registration under Section 64-3-12.3 NMSA 1953.

7-9-23, N.M.S.A. 1978. Exemption; compensating tax; vehicles.

Exempted from the compensating tax is the use of vehicles on which the tax imposed by Section 64-11-15 NMSA 1953 has been paid and on the use of vehicles subject to registration under Section 64-3-12.3 NMSA 1953.

7-9-55, N.M.S.A. 1978. Deduction; gross receipts tax; transactions in interstate commerce.

Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution.

Receipts from transmitting messages or conversations by telegraph, telephone or radio other than from one point in this state to another point in this state and receipts from the sale of radio or television broadcast time when the advertising message is supplied by or on behalf of a national or regional seller or advertiser not having its principal place of business in or being incorporated under the laws of this state, may be deducted from gross receipts. Commissions of advertising agencies from performing services in this state may not be deducted from gross receipts under this section.

7-9-77, N.M.S.A. 1978. Deduction; compensating tax.

A. Fifty percent of the value of agricultural implements, farm tractors, aircraft or vehicles that are not required to be registered under the Motor Vehicle Code [Chapter 66 NMSA 1978] may be deducted from the value in computing the compensating tax due. Any deduction allowed under Subsection B of this section is to be taken before the deduction allowed by this subsection is computed.

B. That portion of the value of tangible personal property on which an allowance was granted to the buyer for a trade-in of tangible personal property of the same type that was bought may be deducted from the value in computing the compensating tax due.

G.R. REGULATION 3(F):10—DELIVERY OUTSIDE NEW MEXICO—

Receipts of New Mexico sellers from sales of property to New Mexico residents who request delivery to be made outside New Mexico are subject to the Gross Receipts Tax.

Receipts of New Mexico sellers from sales of property to nonresidents of New Mexico where delivery is made outside New Mexico by seller's vehicle, common carrier, or U.S. Mail are receipts from transactions in interstate commerce and are deductible from the seller's gross receipts pursuant to Section 7-9-55, and regulations thereunder.

Example 1: T, a Tucumcari appliance dealer, sells a freezer to a restaurant in Muleshoe, Texas. If T delivers the freezer to Muleshoe in his own truck or if T delivers the freezer to Muleshoe by common carrier, T's receipts from the sale may be deducted from his gross receipts. Section 7-9-55. However, if the buyer picks up the freezer at T's Tucumcari place of business, T's receipts are not deductible because the sale was fully consummated in New Mexico.

G.R. REGULATION 55:2—SALES IN INTERSTATE COMMERCE—

Receipts of New Mexico sellers from sales of property to New Mexico residents who request delivery to be made

out-of-state are not transactions in interstate commerce, and are subject to Gross Receipts Tax.

Receipts of New Mexico sellers from sales of property to nonresidents of New Mexico who accept delivery of the property in New Mexico are not transactions in interstate commerce, and are subject to Gross Receipts Tax.

Receipts of New Mexico sellers from sales of property to nonresidents of New Mexico where delivery is made out-of-state by seller's vehicles, U.S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller. See G.R. REGULATION 3(F):10.

G.R. REGULATION 62:4—MINING EQUIPMENT—

The items of mining equipment listed below are "vehicles" as that term is used in this section and Section 7-9-77. Therefore, the fifty percent (50%) deduction provisions of those sections apply to receipts derived from the sale of or the use of such machines. A trade-in deduction pursuant to Section 7-9-71, if applicable, must be taken before the deduction allowed by this section is computed.

The following machines are "vehicles" within the meaning of this section and Section 7-9-77:

Shuttle cars are self-contained mobile mining machines mounted on rubber tire wheels, used to transport broken ore from the ore face in the mine to a loading point, where the ore is loaded into an underground train.

Undercutting machines are self-contained mobile mining machines mounted on rubber tire wheels. These machines are used to under cut or bottom cut the ore face prior to drilling.

Mining drills are self-contained mobile mining machines mounted on rubber tire wheels used to drill holes above the undercut prior to shooting.

Loading machines are self-contained mobile mining machines mounted on tractor treads and are similar to front end loaders. They are used to load ore into shuttle cars.

Electric shovels are self-contained mobile mining machines mounted on tractor treads and are used in open

pit mining operations to load ore and waste material into dump trucks.

The following machines are *not* "vehicles" within the meaning of this section and Section 7-9-77:

Diesel locomotives operated on rails used in underground mining operations.

Cars used with diesel locomotives in underground mining operations.

1. JURISDICTION

The Department challenges our authority to review this case on the following grounds:

1. That Taxpayer has failed to file a complaint on appeal as required by section 7-1-25(B), N.M.S.A. 1978 (1982 Repl. Pamph.); 2. Taxpayer's brief fails to specify any of the exclusive grounds upon which to set aside the decision and order provided by § 7-1-25(D), N.M.S.A. 1978 (1982 Repl. Pamph.); 3. Taxpayer did not assert at the hearing that the assessment violated the Department's regulations and therefore it may not so plead in this appeal.

We have reviewed the record and the briefs and conclude that Taxpayer has sufficiently and substantially complied with the pertinent appellate rules. We have jurisdiction in this matter.

II. GROSS SALES TAX

The Department assessed gross receipt taxes, compensating taxes, penalties and interest against Taxpayer. The assessment was for Taxpayer's activities in McKinley County including sale of coal to non-residents of New Mexico and the use of four draglines. The assessments were made pursuant to §§ 7-9-4 and 7-9-7, *supra*.

Taxpayer challenges this assessment generally claiming that the activities for which the taxes are imposed constitute interstate commerce and that the tax violates the Commerce

Clause of the Federal Constitution (Article 1, § 8, clause 3). To support this position Taxpayer relies mainly on § 7-9-77 and Regulation 62:4, *supra*. The Department contends that the tax imposed is consistent with the gross receipt tax law of New Mexico and specifically §§ 7-9-2, 7-9-5, N.M.S.A. 1978, 7-9-4, 7-9-55, *supra*, and Regulations 3F:10 and 55:2, *supra*. The Department further contends that these taxes are compatible with the Federal Constitution Commerce Clause.

Since the taxes challenged by Taxpayer constitute deductible items we shall set forth the duty of Taxpayer in this situation. First, pursuant to section 7-9-5, *supra*, a presumption of taxability arises. Second, in *Reed* v. *Jones*, 81 N.M. 481, 468 P.2d 882 (Ct.App.1970), this court stated:

> The burden is on the taxpayer to establish clearly his right to the deduction and the intention to authorize the deduction claimed by the taxpayer must be clearly and unambiguously expressed in the statute. (citations omitted).
>
> . . .
>
> In speaking on exemptions from taxation the United States Supreme Court stated in Hoge v. Railroad Co., 99 U.S. 348, 25 L.Ed. 303 (1879), the following:
>
> "* * * But though this power is recognized, it is accompanied with the qualification that the intention of the legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arise [sic] as to the intent of the legislature, it must be solved in favor of the State."

81 N.M. at 482-83.

Any exception or rights to deductions must be contained within the expressed letter or necessary scope of the exempting language. *See McKee* v. *Bureau of Revenue*, 63 N.M. 185, 315 P.2d 832 (1957).

In order for us to decide the issue at hand we must consider certain factors relating to the activities of Taxpayer in McKinley County, New Mexico: 1. We consider the matter of when title to the coal sold passed to the buyer; 2. We consider the matter of agency on the part of the transporter; and 3. We consider, the theory as to whether gross receipt taxes on the privilege of Taxpayer to do business in New Mexico violates the Federal Commerce clause when it is applied to an interstate activity with a substantial nexus to New Mexico.

1. TITLE OF COAL SOLD BY TAXPAYER

In each of the contracts with out-of-state buyers, title to the coal and risk of loss passed from Taxpayer to its customers after the coal was loaded onto the appropriate train, at the mine. The cars in which the coal was loaded were owned by the buyer. After the coal was loaded the transporter was in custody and control of the coal until it reached the buyers' site of use. The official weight of the coal was determined at the McKinley mine when it was loaded into the railroad hopper cars. There is substantial evidence, and there are sufficient findings, that title of the coal did pass to Taxpayer's customers when it was loaded in cars or trucks in New Mexico. Therefore, the question is whether, under the facts and circumstances of this case, passage of title in New Mexico is a matter to be considered as a factor justifying the imposition of the gross receipts tax.

Taxpayer argues that the passage of title approach is an attempt to avoid a collision with the Commerce Clause. We disagree. In *State Tax Com'n of Utah* v. *Pacific States Gas Iron Company*, 372 U.S. 605, 10 L.Ed.2d 8, 83 S.Ct. 925 (1963), the court held that where a vendor sells property, and passage of title and delivery occurs in the vendor state, that state can levy and collect the sales tax on that transaction.

Regulation 3(F):10, *supra*, provides that if an out-of-New Mexico buyer picks up the subject of his purchase at the New Mexico vendor's place of business, the vendor's gross receipts

are not deductible. Regulation 55:2, *supra*, provides that receipts of New Mexico sellers from non-residents of New Mexico who accept delivery in New Mexico are subject to the tax. Similarly, in *Baskin-Robbins Ice Cream Co.* v. *Revenue Div.*, 93 N.M. 301, 599 P.2d 1098 (Ct.App.1979), the court stated as follows:

> Taxpayer is not engaged in interstate commerce. The tax here imposed is conditioned on Creamland's local business of manufacturing and selling ice cream products in New Mexico. It is not a tax imposed on the importation of property or the rendering of services outside the State; neither is it a tax measured by income derived from manufacturing and selling ice cream products in any other state; nor is the tax different from that assessed and paid by local taxpayers in manufacturing and selling ice cream products for others.

93 N.M. at 306.

In *Miami Copper Co. Etc.* v. *State Tax Com'n*, 121 Ariz. 150, P.2d 24 (Ct.App.1978) the Arizona Court of Appeals stated as follows:

> It is well established, however, that intent to export to another nation or state does not alone determine whether in fact the goods have become exports or have entered interstate commerce. *See* Kosydar v. National Cash Register, 417 U.S. 62, 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974); Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1886).
>
> The reasoning behind the rule is well stated in Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922). ". . . If the possibility, or *indeed certainty*, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South,

> the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, the coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production. [Emphasis added.]" 260 U.S. at 259-60, 43 S.Ct. at 86, 67 L.Ed. at 243.
>
> From the foregoing, we conclude that the taxpayer's mineral products did not enter interstate commerce at any time before completion of the smelting process in Arizona. A taxpayer may not immunize from taxation the value added to his product merely because it was committed to eventual out-of-state consumption or sale before it was subjected to local processing or manufacture. Taxpayer's copper did not enter interstate commerce as that term is contemplated by A.R.S. § 42-1316 until it began its journey to the New Jersey and Texas refineries. [Emphasis added.]

589 P.2d at 28-29. *See also State Board of Equalization* v. *Blind Bull Coal Co.*, 55 Wyo. 438, 101 P.2d 70 (1940), (Wyoming Supreme Court gave examples of activities that precede interstate transportation and which were treated as taxable local events.)

We conclude that the question of title and delivery of coal in New Mexico is a positive factor upon which to determine that the tax does not interfere with the Commerce Clause of the U.S. Constitution.

2. AGENCY

The reviewing officer made findings showing that he considered it to be important whether the transporter of the coal was the buyers' agent. Evidence at the hearing showed that the coal was loaded at the mine into rail cars or trucks. In either case, the means of conveyance was that of the buyers. There was no evidence that coal was transported by Taxpayer, or that a common carrier was employed. *See* Finding Part A, 10(a), *supra*.

Notwithstanding the findings, Taxpayer contends that agency is not significant. We disagree. *See Standard Oil Co.* v. *Johnson*, 147 P.2d 577 (Cal. 1944). The court in *Standard Oil* stated that whether delivery to the carrier constituted delivery to the buyer depended upon intentions of the parties, as ascertained from the contract and other factors in the case. 147 P.2d at 580. In the case at bar, the buyers owned the hopper cars or trucks and arranged for the transportation of the coal. Furthermore, we concluded above that title passed when the coal was loaded into the buyers' cars or trucks.

We conclude that the coal did not enter interstate commerce until after title and delivery passed. The railroad or the respective transporter for the buyers was their agent, designated to accept delivery of the coal. Applying agency principles, the delivery of coal to the agent was in effect delivery to the buyer. Accordingly, agency becomes an important factor for determination of this matter.

3. CONFLICT WITH THE COMMERCE CLAUSE

Consideration of whether a state imposed tax runs afoul of the Commerce Clause of the Federal Constitution is governed by the four part test of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977). To be sustained, a state tax upon items concerned with interstate commerce must: (A) be applied to an activity with a substantial nexus with the taxing state; (B) be fairly apportioned; (C) not discriminate against interstate commerce; and (D) be fairly related to the services provided by the state. 430 U.S. at 279. We will examine each prong of the test.

A. Substantial Nexus With The Taxing State

The first requirement for valid imposition of a state tax is that the activity taxed has a substantial nexus with the taxing state. *Complete Auto Transit, Inc.* v. *Brady, supra.* In the case at bar gross receipts taxes were assessed against Taxpayer for the sale of coal. The New Mexico Supreme Court stated in *Bennett* v. *Western Sur. Co.*, 95 N.M. 13, 14, 618 P.2d

357 (1980), that "sale 'means' the passing of title and possession of property for money which the buyer pays, or promises to pay." The record shows that title to and possession of the coal passed to the buyers in New Mexico. Moreover, delivery to the buyers' conveyances was made in New Mexico, and the buyers' legal obligations became fixed in the state. Accordingly, evidence in the record supports the determination that the activity taxed had a substantial nexus with New Mexico.

B. The Tax Must Be Fairly Apportioned

The second prong of the test in *Complete Auto Transit* is that taxes imposed upon interstate commerce must be fairly apportioned. The thrust of this requirement is that while interstate commerce may be required to bear its fair share of the cost of state government, the tax cannot amount to a trade barrier. *See Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 101 S.Ct. 2946 (1981). The Coal Company contends that because the New Mexico gross receipts tax is unapportioned it requires the Coal Company to pay more than a fair share.

In *General Motors Corporation* v. *Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), the United States Supreme Court addressed the imposition of a gross receipts tax as follows:

> A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, i.e., the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities. As was said in Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940),

> "[t]he simple but controlling question is whether the state has given anything for which it can ask return."

337 U.S. at 440-41.

In the case at bar, the tax was imposed on Taxpayer's gross receipts derived from the sales of coal. As was set out above, the delivery and sale of the coal was consummated within the borders of New Mexico. Therefore, according to the authority cited, and the facts of this case, there is ample evidence to support a determination that the tax was fairly apportioned.

C. The Tax Cannot Discriminate Against Interstate Commerce

The third requirement of the test in *Complete Auto Transit* is that the tax cannot discriminate against interstate commerce. The purpose for this prong of the test is to ensure that intrastate and interstate commerce stand on the same footing. Accordingly, no state is permitted to impose taxes which discriminate against interstate commerce by providing direct commercial advantage to local enterprises. *Boston Stock Exch.* v. *State Tax Com'n.*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). *See also Commonwealth Edison Co.* v. *Montana*, *supra*. Our review of the record failed to produce, and the parties do not point us to, any evidence that intrastate and interstate coal mining operation are taxed in a disparate fashion. Therefore, we find nothing which refutes the determination that the tax did not discriminate against interstate commerce.

D. The Tax Must Be Fairly Related To The Services Provided By The State

The fourth and final prong of the test in *Complete Auto Transit* is that the tax imposed must bear a fair relation to the services provided by the state. The Court in *Commonwealth Edison* v. *Montana* explained the operation of this requirement as follows:

> This Court has indicated that States have considerable latitude in imposing general revenue taxes. The Court

has, for example, consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stated as a barrier against taxes that are "unreasonable" or "unduly burdensome." See, e.g., *Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974); *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109 (1934); *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U.S. 44, 41 S.Ct. 219, 65 L.Ed. 489 (1921). Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522, 57 S.Ct. 868, 878-79, 81 L.Ed. 1245 (1945) (citations omitted).

See *St. Louis & S.W.R. Co.* v. *Nattin*, 277 U.S. 157, 159, 48 S.Ct. 438, 72 L.Ed. 830 (1928); *Thomas* v. *Gay*, 169 U.S. 264, 280, 18 S.Ct. 340, 346, 42 L.Ed. 740 (1898).

> There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State. "The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted

as that for domestic corporations." *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, 334-335, 60 S.Ct. 273, 275, 84 L.Ed. 304 (1939); *see also Ott* v. *Missippi Valley Barge Line Co.*, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949). To accept appellants' apparent suggestion that the Commerce Clause prohibits the States from requiring an activity connected to the interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, would place such commerce in a privileged position. But as we recently reiterated, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 108, 95 S.Ct. 1538, 1543, 44 L.Ed.2d 1 (1975), quoting *Western Live Stock* v. *Bureau of Revenue*, 303 U.S., at 254, 58 S.Ct., at 548. The "just share of state tax burden" includes sharing in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207, 228, 100 S.Ct. 2109, 2123, 65 L.Ed.2d 66, quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S., at 445, 99 S.Ct. 1813, 1819-20. See *Washington Revenue Dept.* v. *Association of Wash. Stevedoring Cos.*, 435 U.S. at 750-751, 98 S.Ct., at 1399; *id.*, at 764, 98 S.Ct., at 1406 (POWELL, J., concurring); *General Motors* v. *Washington*, 377 U.S. 436, 440-41, 84 S.Ct. 1564, 1567-68, 12 L.Ed.2d 430 (1964).

101 S.Ct. at 2956-57.

In the case at bar the record demonstrates that the tax revenues were used to support New Mexico's services to Taxpayer, their mine and employees, and to benefit the economic, legal, political and social systems afforded every resident, whether citizen or not. Accordingly, we find sufficient evidence to support the determination that the tax was related to the service provided.

E. Summary

Our application of the test in *Complete Auto Transit* reveals that the business of Taxpayer taxed occurs entirely within

McKinley County, New Mexico (criterion 1). The tax is applied equally to interstate and intrastate commerce (criterion 2). The tax is limited to a base which relates only to Taxpayer's activities within McKinley County, New Mexico, and does not discriminate against interstate commerce because its application is to activities conducted, and revenues realized, by Taxpayer wholly within New Mexico (criterion 3). And finally, the tax is intimately related to "services" provided by the State: the availability of the coal itself, as well as the labor force, roads, environment and protection afforded to Taxpayer by the State (criterion 4). The New Mexico Gross Receipts Tax Act, in its application to Taxpayer meets every test of validity prescribed by the federal constitution and courts.

Considering all the factors of activities of Taxpayer, including the sale of the coal, the passage of the title, the matter of agency and other factors incidental to Taxpayer's activities, and based upon authorities which we have reviewed, we hold that the imposition of the taxes did not impermissibly interfere with the Commerce Clause of the Federal Constitution. We conclude that the decision of the Department was neither capricious nor arbitrary and that it was made in accordance with the facts and the law applicable to the case at bar.

III. COMPENSATING TAXES ON DRAGLINES

The Department assessed compensating taxes with interest and penalty on the use of four draglines, pursuant to § 7-9-7, *supra*. The assessment was protested by Taxpayer but upheld by the Hearing Examiner. Taxpayer challenges the assessment on grounds that it is entitled to a deduction provided by § 7-9-77, *supra*, and Regulation 66:4. The argument of Taxpayer is that if draglines are not vehicles under the Motor Vehicle Code they should be considered vehicles under § 7-9-77 and Regulation 62:4. We would agree with this statement if we accepted the premise that the language of the statute is plain in the sense that it can be reasonably read only as Taxpayer would read it. But we do not agree with that premise. "The notion that because words of a statute are plain, its meaning is

also plain, is merely pernicious oversimplification." *U.S.* v. *Monia*, 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed. 376 (1943) (Frankfurter, Justice, dissenting).

Our duty is to find that interpretation which can most fairly be said to be imbedded in the statute in the sense of being most harmonious with its scheme and with the general purpose that the Legislature manifested. The question is whether draglines are vehicles under § 7-9-77, *supra* and the pertinent regulations. The evidence in respect to the draglines is clear and uncontradicted. The Hearing Examiner's findings are not challenged in respect to draglines. Therefore, the facts of the Hearing Examiner are the facts before this court. Our conclusion by *Kaiser Steel Corp.* v. *Revenue Division*, 96 N.M. 117, 628 P.2d 687 (Ct.App.) *cert. denied*, 96 N.M. 116, 628 P.2d 686 (1981), is controlling in the case at bar. This court said:

> From all the foregoing, we find it impossible to conclude that the continuous miner and dragline are "vehicles" under the Motor Vehicle Code. *Accord Gibbons & Reed Company* v. *Bureau of Revenue*, 80 N.M. 462, 457 P.2d 710 (1969).
>
> . . . .
>
> Because the machine must, in the first instance, be a 'vehicle' in order to qualify under either exception, see *Gibbons & Reed Company* v. *Bureau of Revenue*, *supra*, and, as shown above, neither the dragline nor continuous miner can be so classified, under § 66-1-4(B)(71), neither are 'vehicles not required to be registered' within the meaning of § 7-9-77. Further, as to the requirements of § 66-3-1(B), a finding that a machine 'moves' or is 'mobile' does not in itself support a conclusion that the machine can be 'driven or moved upon a highway' for any purpose. In fact, the evidence here is to the contrary.
>
> . . . .
>
> Neither the dragline or continuous miner are 'vehicles' exempt from registration under the Motor Vehicle Code.

96 N.M. at 122-23. The court in *Kaiser* also noted the following:

> A similar case was presented in *Gibbons & Reed Company* v. *Bureau of Revenue*, 80 N.M. 462, 457 P.2d 710 (1969),

> which held that a piece of mining equipment called a 'mole' was not 'special mobile equipment' because it did not come within the general descriptive terms of the section. [§ 64-1-12, N.M.S.A. 1953 Comp., now § 66-1-4(B)(60), N.M.S.A.]. The 'mole' which weighed approximately one hundred tons, was used to move employees and supplies in and out of a tunnel and to remove excavated material from the tunnel.

96 N.M. at 123 n.1.

We conclude that the draglines are not vehicles under either § 7-9-77 or Regulation 42:10, *supra*. The decision of the Department in denying deduction for compensating tax and in assessing the compensating tax was neither arbitrary nor capricious, but made in accordance with law. The decision and order of the Department is affirmed.

Appellate costs shall be paid by the Taxpayer.

IT IS SO ORDERED.

/s/ Ramon Lopez, Judge
RAMON LOPEZ, JUDGE

WE CONCUR:

/s/ William R. Hendley, J. (Concurring in result only.)
WILLIAM R. HENDLEY

/s/ Thomas A. Donnelly, J.
THOMAS A. DONNELLY

APPENDIX C

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

Monday, February 21, 1983

No. 5910
D.C. No.

PITTSBURGH AND MIDWAY
COAL MINING COMPANY,
Petitioner-Appellant,
vs.

REVENUE DIVISION OF THE TAXATION
AND REVENUE DEPT. OF THE STATE
OF NEW MEXICO,
Defendant-Appellee.

RAMON LOPEZ
Presiding Judge

WILLIAM HENDLEY
THOMAS DONNELLY
Judges

In this cause, a motion for rehearing having been filed by appellant, and consideration having been had by all of the members of the original panel,

IT IS ORDERED that the motion for rehearing be DENIED.

/s/ Ramon Lopez
RAMON LOPEZ
Presiding Judge

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 14,841

PITTSBURGH & MIDWAY
COAL MINING COMPANY,
Petitioner,

vs.

REVENUE DIVISION, TAXATION
AND REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO,
Respondent.

Proceeding on Certiorari

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby granted, and the writ of certiorari shall issue from this Court as prayed for in the petition.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderite
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

No. 14,841

PITTSBURGH & MIDWAY
COAL MINING COMPANY,
Petitioner,
vs.

REVENUE DIVISION, TAXATION
AND REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO,
Respondent.

WRIT OF CERTIORARI

THE STATE OF NEW MEXICO

TO: Court of Appeals

GREETING:

WHEREAS, the Petitioner, through its attorneys, Montgomery & Andrews, John B. Pound, Santa Fe, New Mexico, and Donald E. Willson, Denver, Colorado, did apply to this Court on March 11, 1983 for its review of the decision handed down by the Court of Appeals on February 3, 1983 in Cause No. 5910 entitled Pittsburgh & Midway Coal Mining Company vs. Revenue Division, Taxation and Revenue Department of the State of New Mexico; and

WHEREAS, the Supreme Court gave notice to the Court of Appeals on March 11, 1983, in compliance with Rule 28(f) of the Rules of Appellate Procedure for Civil Cases, that an application for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the application for writ of certiorari has been filed in the above entitled cause.

NOW, THEREFORE, the writ of certiorari is hereby issued, and the Court of Appeals is hereby ordered to proceed

no further in Cause No. 5910 pending the further order of the Court.

WITNESS, The Hon. H. Vern Payne, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 22nd day of April, 1983.

(S E A L)

/s/ Rose Marie Alderite
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Tuesday, May 3, 1983

No. 14,841

PITTSBURGH & MIDWAY
COAL MINING COMPANY,
Petitioner,
vs.

REVENUE DIVISION, TAXATION
AND REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO,
Respondent.

Proceeding on Certiorari

This matter having heretofore been submitted and taken under advisement, and a writ of certiorari having issued from this Court on April 22, 1983;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari heretofore issued in this cause on April 22, 1983, is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 5910 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderite
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Docket No. 5910

THE PITTSBURGH & MIDWAY COAL MINING CO.,
Protestant-Appellant, vs.

REVENUE DIVISION, TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appellant, The Pittsburg & Midway Coal Mining Co., appeals to the Supreme Court of the United States from the final judgment of this court entered May 3, 1983, affirming the decision and order of the Director of the Revenue Division of the Taxation and Revenue Department of the State of New Mexico imposing tax assessments of $4,791,893.34 for New Mexico gross receipts tax, plus interest.

This appeal is taken pursuant to 28 U.S.C.A. § 1257. Gross receipts taxes were imposed upon Appellant under New Mexico Statutes Annotated § 7-9-4 (1978). Appellant at all times has claimed that the taxes assessed against it under said statute were in violation of the "Commerce Clause" of the Constitution of the United States, Article I, § 8, cl.3. The final

judgment from which this appeal is taken is in favor of the validity of said statute.

/s/ J. Mitchell Reese
J. MITCHELL REESE

/s/ Donald E. Willson
DONALD E. WILLSON
1720 South Bellaire Street
Denver, Colorado 80222
(303) 759-6778

and

WILLIAM H. ALLEN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Attorneys for Appellant
The Pittsburg & Midway Coal Mining Co.

[Stamped: July 25, 1983]

* * *

APPENDIX G

List of Corporations in which GULF OIL CORPORATION, Parent of the Appellant, THE PITTSBURG & MIDWAY COAL MINING CO., Is Less Than a 100 Percent Owner.

A/S Jargul

A/S Jargul and Co. K/S

AB Djurgardsberg

Adela Investment Company, S.A.

Allied — General Nuclear Services

Andogas S.A. (Switzerland)

Asia Polymer Corp

Autobahn-Raststaette Wuerenlos AG

China Gulf Oil Company Limited

Chinhae Chemical Company, Ltd.

Colonial Pipeline Company

Delaware Bay Transportation Company

Det Gronlandske Olieaktieselskab

Dixie Pipeline Company

Emery Joint Venture

Ethyleen Pijpleiding Maatshcappij (Belgium) S.A.

Ethyleen Pijpleiding Maatshcappij (Nederland) B.V.

Explorer Pipeline Company

Forenade Svenska Oljeimportorers AB

Gulf Canada Limited

Gulf Oil Canada Limited
Associated Companies

Gulf Oil Corporation Erisa

Gulf Oil Terminals (Ireland) Limited

Gulf Oil Zaire S.A.R.L.

Harshaw — Bryce & Co. Pty. Ltd.

Harshaw — Juarez S.A. de C.V.

Harshaw — Murata Kabushiki Kaisha

Harshaw Galvanotecnia S.A.

Harshaw Quimica Ltda.

Hochtemperatur Reaktorbau GMBH

Insco Holding & Finance Company N.V.

Keydril (Nigeria) Limited

Kuwait Oil Company Limited

Laurel Pipe Line Company

Mainline Pipelines Limited

Mid-Valley Pipeline Company

Midwest Carbide Corporation

North River Energy Company

Oil Shippers Service, Inc.

Oklahoma Nitrogen Company

Paloma Pipe Line Company

Pembroke Capital Company

Pembroke Cracking Company

Petrosil Oil Company Limited

Plastigama, S.A.

Plastijal Sociedad Anonima

Platte Pipeline Company

Pol Transport AB

Pyropower Corporation

Raffinerie de Cressier S.A.

Rio Blanco Oil Shale Partnership

Sarni S.P.A. — Refining

Solvent Refined Coal International, Inc.

Solvo Finanzierungs und Beteiligungs AG

Sunrise International Company Limited

Svensk Petroleum Administration A.B.

Svensk Petroleum Largring Tre A.B.

Svenska Petroleum Forvalting A.B.

Taita Chemical Corporation

Valley Pines Associates

Venezuela Gulf Refining Company

West Texas Gulf Pipe Line Company